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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 3013

MRS. ROBERT LEE TURMAN AND CULLEN B. GOSNELL,

Plaintiffs,

vs.

J. LON DUCKWORTH, AS CHAIRMAN OF THE GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE: MISS GRACE CANNINGTON, AS SECRETARY GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE; THE STATE DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA; BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA,

Defendants

STATEMENT AS TO JURISDICTION

Pursuant to the provisions of Rule 12 of the Supreme Court of the United States, the above named complainants and appellants file this their separate statement particularly disclosing the basis upon which they contend the Supreme Court of the United States has jurisdiction upon appeal to review the order or decree here appealed from which was entered in the District Court of the United States for the Northern District of Georgia by a statutory court

consisting of Judge Samuel H. Sibley, Circuit Judge, Louie W. Strum and Frank M. Scarlett, District Judges specially convoked under and by virtue of the provisions of Sec. 266 of the Judicial Code (28 U. S. C. A., Sec. 380); as follows:

(a)

Statutory Provision Believed to Sustain Jurisdiction

The jurisdiction of the Surpeme Court of the United States upon appeal is invoked under Sections 238 and 266 of the Judicial Code as amended by the Acts of Feb. 13, 1925, c. 299, Sec. 1 (43 Stat. 938) (U. S. C. A. Title 28, Sections 345 and 380).

(b)

Statute of the State, the Validity of Which Is Involved

The statute of the State of Georgia, the validity of which is involved, and which is attacked directly as being contrary to the Constitution of the United States, will be found in the Code of Georgia of 1933 (Annotated), Book 12, Part VI, Chapter 34-32, (pages 91 through 99), and more especially Sections 34-3212 through 34-3218 (pages 95 through 99), the latter Sections as originally enacted, being found in Georgia Laws, 1917, pages 183-189. Sec. 34-3212, at page 96, Book 12 of said Code, which is the portion of said Act material to this case, is as follows:

> "Whenever any political party shall hold primary elections for nomination of candidates for United States Senator, Governor, Statehouse officers, Justices of the Supreme Court, and Judges of the Court of Appeals, such party or its authorities shall cause all candidates for nominations for said offices to be voted for on one and the same day throughout the State, which is hereby fixed as the second Wednesday in September of each year in which there is a regular general

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election. Candidates for nominations to the above-named offices who receive, respectively, the highest number of popular votes in any given county shall be considered to have carried such county, and shall be entitled to the full vote of such county on the county unit basis, that is to say, two votes for each representative to which such county is entitled in the lower House of the General Assembly. If in any county any two or more candidates shall tie for the highest number of popular votes received, the county unit vote of such county shall be equally divided between the candidates so tying. All such county unit votes shall within 10 days after such primary be accurately consolidated by the chairman and secretary of the State committee of the political party holding such primary, and published in a newspaper published at the Capital, within three days after the completion of the consolidation, certified under the hands and seals of said chairman and secretary; and the candidates for said offices, respectively, who shall receive a majority of all the county unit votes, throughout the entire state, upon the basis above set forth, shall be declared by the State convention of the party holding such primary, or the permanent chairman thereof, or other party authority, without the necessity of a formal ballot, to be the nominees of such party for the above-named offices, respectively, and it shall be the duty of the State executive committee elected or appointed at such convention, or by its authority, or the chairman or secretary thereof, or other authority of such party, to see to it that the names of all such successful candidates shall be placed upon the tickets or ballots of such party at the general election following such primary, and such successful candidates shall be considered, deemed and held as the duly nominated candidates of such party for the offices named: Provided, that in the event there are only two candidates for any particular office referred to in this section, and it shall appear, after the consolidation of all of the county unit votes throughout the State, that said candidates have received an equal number of county unit votes, the one who shall have

received a majority of the popular votes shall be declared by the State Convention of the party holding such primary, or the permanent chairman thereof, or other party authority, without the necessity of a formal ballot, to be the nominee of such party for such office; and it shall be the duty of the State executive committee elected or appointed at such convention, or by its authority, or the chairman or secretary thereof, or other authority of such party, to see to it that the name of such successful candidate shall be placed upon the tickets or ballots of such party at the general election following such primary, and such successful candidate shall be considered, deemed and held as the duly nominated candidate of such party for the office named: Provided, further, that if no convention of such party shall be called or held, the declaration of the result shall be made in such manner as may be prescribed by the State Committee or other authority of such party." (Acts 1917, pp. 183-184.)

To be considered in connection with the relief sought are the following statutes and provisions of the Constitution of Georgia, to-wit:

(1)

Art. V, Sec. 1, par. II, III, and IV of the Constitution of Georgia as adopted Aug. 7, 1945, copy of which is attached hereto as Appendix "A".

(2)

Act of the General Assembly of Georgia, approved Mar. 20, 1943 (Georgia Laws 1943, pp. 347-348, Sec. 1) material portions of which are attached hereto as Appendix "B".

(3)

Act of the General Assembly of Georgia, approved Jan. 7, 1944 (Georgia Laws 1944, Ex. Session pp. ——), commonly referred to as the "Soldier's Voting Law", the applicable portions of which are attached hereto as Appendix "C".

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(4)

Act of the General Assembly of Georgia, approved Feb. 1, 1946 (Act 632, Georgia Laws 1946, pp. ——), copy of which is attached hereto as Appendix "D".

(c)

Date of the Judgment or Decree

The date of the judgment or decree sought to be reviewed herein is August 24, 1946 and the date upon which the application for appeal is presented is September 13th 1946.

(d)

Nature of the Case and Rulings of the Court Bringing the Case Within the Jurisdictional Provisions Relied upon

The Constitution of Georgia contains no equal protection clause in the sense of Sec. 1 of the Fourteenth Amendment to the Constitution of the United States. The Constitution of Georgia does provede that the Governor shall be elected in a statewide election by a majority of the votes cast. Nomination in Democratic Primaries in Georgia is tantamount to election and has been historically so. The General Assembly of Georgia by an Act in 1917 entitled "Nominations by County Units" set up a system of nominations for Governor and other State officials by party primaries as a part of the State election system and required the result of such primary elections to be determined by a County unit plan. Under the County unit plan Fulton and DeKalb Counties, Georgia, with populations of 392,886 and 86,942 (Census of 1940) are each given six unit votes, while Quitman and Echols Counties with populations of 3,435 and 2,964 respectively are each given 2 unit votes. In the Democratic Primary of July 17, 1946, 84,50 ballots were cast in Fulton County while in Chattahoochee County (2 Unit

votes) only 265 ballots were cast. The foregoing instances are but illustrations of the system provided, the general pattern giving to individual votes in the smaller counties many times (in varying ratio) more value than the votes in the more populous counties.

Plaintiffs are respectively citizens and qualified voters of Fulton and DeKalb Counties, and voted in the Democratic Primary held July 17, 1946, casting their ballots for a candidate for nomination for Governor of Georgia who obtained the plurality of votes cast in the primary, but did not obtain the majority of the county unit votes required by the Act of 1917. Plaintiffs contend the Act of 1917 is an unreasonable discrimination against all voters residing in any but the smallest counties, said discrimination as to registered voters in Fulton County depreciating their votes to such an extent that it requires 106 plus votes in Fulton County to have the same value as 1 vote in Chattahoochee County.

Plaintiffs sought to have the Act of 1917 declared null and void, as contrary to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, sought relief under Civil Rights Act (Title 8 USCA Sec. 43), and further sought to have the Chairman and Secretary of the Georgia State Democratic Executive Committee and the Secretary of State enjoined from complying with the Act of 1917 and from certifying the results of the Primary held under it or of the General election in which only its nominees can under the facts alleged be candidates.

The District Judge ordered the petition filed, but refused a restraining order and summoned a Court of three judges to consider the grant of an interlocutory injunction pursuant to Sec. 266 of the Judicial Code, as amended by Act of Feb. 13, 1925, clause 299, Sec. 1 (USCA Title 28, Section 380).

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The cause came on for hearing before the three Judge Court on August 16, 1946. After hearing evidence and argument, the Court on August 24, 1946 rendered the following judgment or decree:

> "On August 16, 1946, the above stated case came on for a hearing for an interlocutory injunction before a court of three judges as by statute provided, Hon. Frank M. Scarlett, District Judge, presiding by designation in the Northern District of Georgia, having called to his assistance Hon. Samuel H. Sibley, Circuit Judge, and Hon. Louie W. Strum, District Judge of the Southern District of Florida. After hearing evidence and argument and taken time to consider, it is ordered and adjudged that because of the findings of fact and conclusions of law filed herewith, an interlocutory injunction be and the same is hereby denied."

The Court also made certain findings of fact and conclusions of law in connection with the entry of the above decree or judgment. Copies of these findings and conclusions are reproduced as an appendix "E", and attached to this jurisdictional statement.

The appeal prayed for is to the Supreme Court of the United States from the order or decree denying plaintiffs an interlocutory injunction and is provided for by Sec. 266, Judicial Code, as amended by the Act of Feb. 13, 1925, c. 299, Sec. 1 (43 Stat. 938) (Title 28 USCA, Sec. 380).

(e)

Grounds upon Which It Is Contended the Questions Involved Are Substantial

1. Under the Constitution of the State of Georgia the Plaintiffs, and each member of the class they represent, were all put upon equal basis without classification as to their right to vote, and have their ballot counted on an

equal basis with every other vote cast by a qualified elector throughout the State. This right the Legislature has sought to take away by destroying the full effectiveness of their votes. This action obviously deprives plaintiffs of the equal protection of the laws. The Fourteenth Amendment forbids such discrimination. It does not permit the States to pick out certain qualified citizens or groups of citizens and deny them the right to vote at all. Since there is no adequate remedy for depriving a citizen of his right to vote under a scheme which while permitting the vote to be cast, nevertheless, destroys its value by a required method of counting, equity can and should grant relief.

The Supreme Court of the United States has prevented discriminatory classification of voters and has forced unwilling parties, indeed unwilling States, to abandon classification, e. g., against color. The Act of 1917 which deprives plaintiffs of the full effectiveness of their votes by a classification based upon different locale of residence within the area presents equally as substantial a question, and is a proper concern of this Court.

(f)

Cases Believed to Sustain Jurisdiction

The following decisions of the Court are believed to sustain the jurisdiction of the Supreme Court of the United States on a direct appeal to review the judgment or decree here in question:

Stratton v. *St. Louis Southwestern Railway Co.*, 282 U. S. 10; 75 L. Ed. 135 (1930);
Nixon v. *Herndon*, 273 U. S. 536;
Snowden v. *Hughes*, 321 U. S. 1; 88 L. Ed. 497;
Ex parte Seibold, U. S. 371;
Filey v. *Sinkler*, 179 U. S. 58;
U. S. v. *Classic*, 313 U. S. 299; 85 L. Ed. 1[illegible]7.

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(g)

Matters in Which the Specially Constituted District Court of the United States Abused Its Discretion in Failing to Grant an Interlocutory Injunction.

(1) The Court refused to exercise its discretion, holding "whether it be that the subject matter is not of equitable cognizance, or merely that equity should withhold its hand, we think the decision in Colegrove *vs.* Green, 90 L. Ed. 1242, requires us to deny equitable relief."

The questions before the Court in this case and the *Colegrove* case are entirely different and the necessity for and results of injunctions in the two cases are likewise entirely different. In the pending case, election has been held and the votes have been counted. The method used violates the rights of the plaintiffs derived from the Constitution of Georgia, and denies them the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States. The Court was asked to enjoin further proceedings based on the unlawful method of evaluation of plaintiffs' votes. Plaintiffs' challenge to this method of counting ballots was timely, and adequate relief could be had in no other manner and at no other time. The *Colegrove* case is in no respect authority for holding to the contrary. It was not a conclusive determination of any question made in the present case. The Appellants contend that the trial court should have exercised its own discretion as applicable to the facts before it rather than being coerced by a misconception as to the binding effect of a Supreme Court decision which is readily distinguished both in its facts and in the effect of an injunction.

(2) The refusal of the Court to exercise its sound discretion, appellants contend, amounted in law to an abuse of discretion.

(3) If it can be said that the District Court exercised its discretion in denying the interlocutory injunction prayed upon the authority of *Colegrove* vs. *Green, supra,* said Court abused its discretion, for, as appellants contend, the majority judgment in the case of *Colegrove* vs. *Green, supra,* shows upon its face that the judgment of the majority (there being no majority opinion) rested upon reasons not germane to the issues in this case.

Respectfully submitted,

CHARLES S. REID,
MARSHALL L. ALLISON,
HAROLD T. PATTERSON,
WILLIAM F. LOZIER,
JOHN L. TYE,
WILLIAM D. THOMSON,
Counsel for Appellants.

Dated this 13th day of September, 1946.

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APPENDIX "A"

"*Election for Governor.* The first election for Governor, under this Constitution, shall be held on Tuesday after the first Monday in November of 1946, and the Governor-elect shall be installed in office at the next session of the General Assembly. An election shall take place quadrennially thereafter, on said date, until another date be fixed by the General Assembly. Said election shall be held at the places of holding general elections in the several counties of this State, in the manner prescribed for the election of members of the General Assembly, and the electors shall be the same." Article V, Section 1, Para. II, Constitution of the State of Georgia (as adopted in 1945).

"*Returns of elections.* The returns for every election of Governor shall be sealed up by the managers, separately from other returns, and directed to the President of the Senate and Speaker of the House of Representatives, and transmitted to the Secretary of State, who shall, without opening said returns, cause the same to be laid before the Senate on the day after the two houses shall have been organized, and they shall be transmitted by the Senate to the House of Representatives." Article V, Section 1, Para. III, Constitution of the State of Georgia (as adopted in 1945).

"*How returns published.* The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; but, if no person shall have such majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice." Article V, Section 1, Para. IV Constitution of the State of Georgia (as adopted in 1945).

APPENDIX "B"

Section 34-3215a of the Supplement to the Annotated Code of Georgia, codified from Ga. Laws 1943, page 347, reads as follows:

"Immediately after the consolidation of the votes in any such primary election a certificate, showing the names of such candidates and the offices for which they are candidates, shall be filed in the office of the Secretary of State of this State; such certificate to be signed by the chairman and secretary of the State Committee of the political party holding such primary. Said certificate shall show by counties the total number of popular votes and the county unit votes received by each candidate in any such primary election. (Acts 1943, p. 347.)"

APPENDIX "C"

Sections 8 and 10 of an act of the General Assembly of Georgia, approved January 7, 1944 (Ga. Laws 1944, Ex. Sess. pp. 4-5) commonly referred to as the soldier's voting law read:

Sec. 8: "In order to allow more adequate time for the participation of members of the military in elections and party primaries, the following provisions are enacted in lieu of those now provided by law:

1. All candidates for national and state offices, or the proper authorities of the political party nominating them, shall file notice of their candidacy, giving their names and the offices for which they are candidates, with the Secretary of State, at least ninety days prior to the regular election. All candidates for district and county offices either by themselves or by the proper authorities of the party nominating them, shall file notice of their candidacy with the Ordinary of the County at least ninety days before the regular election.

2. Whenever any political party shall hold primary elections for nomination of candidates for office for Governor, State House Officers, Members of Congress,

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United States Senators, Judges of the Superior Courts, Justices of the Supreme Court, Judges of the Court of Appeals, Solicitors General, and Members of the General Assembly, which are by law voted on one and the same day throughout the State, said primary may be held on such date as may be fixed by the State Executive Committee of such party, and the State Executive Committee is authorized to fix such time for the said primary, second primary, or party convention as it may determine without respect to the time now provided by law as the date on which the said primary, second primary, or convention shall be held."

Sec. 10: "The Governor shall furnish the several Ordinaries all blank forms necessary for the general elections in sufficient time for the ordinaries to have the ballots printed at least seventy days before election day."

APPENDIX "D"

Senate Bill 142. Act No. 632

Approved Feb. 1, 1946

AN ACT

"To repeal Chapter 34-14, Section 34-1401, Section 34-1402 and Section 34-1403, relating to blank forms, tally sheets and blank lists of voters, and certificates used in the holding of elections in their entirety, and to repeal paragraph 7 of Section 40-601 of the Code of Georgia of 1933, relating to the duties of the Secretary of State as to furnishing forms of returns, certificates, directions and advice to the Ordinaries with reference to holding elections and for other purposes; and substitute for said paragraph 7 a new paragraph prescribing the duties of the Secretary of State with reference to furnishing all necessary forms for holding elections, and to enact a new paragraph to be known as paragraph 1a and 7b, and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1

That Chapter 34-1401, 34-1402 and 34-1403 of the Code of Georgia of 1933 prescribing certain duties upon the Governor relating to the furnishing of certain blank forms, tally sheets and blank lists of voters and certificates used in the holding of elections be and the same are hereby repealed in their entirety.

Section 2

That paragraph 7 of Section 40-601 of the Code of Georgia, relating to the duties of the Secretary of State as to furnishing forms of returns, certificates, directions and advice to the Ordinaries with reference to holding elections and for other purposes, be and the same is hereby repealed in its entirety.

Section 3

That in lieu of paragraph 7 of said Section 40-601 of the Code of Georgia of 1933 a new paragraph to be known as paragraph 7 is hereby enacted to read as follows: "The Secretary of State shall furnish each Ordinary of the State the Form of official ballot, all blank forms, including tally sheets, blank lists of voters, forms of returns, certificates and directions to be used in all elections for United States Senate, Governor, Electors of President and Vice-President of the United States, Representatives to Congress, Secretary of State, State Treasurer, Comptroller General, Attorney General, State Superintendent of Schools, Supreme Court of Appeals, Judges of the Superior Court Solicitor General, Public Service Commission, Commissioner of Labor, Members of the General Assembly, and County Officers. The Secretary of State shall certify to the respective Ordinaries the names of all candidates for national and state offices who have qualified as such as provided in Section 34-1904 of the Code of Georgia and in case there are one or more persons purporting to represent the same political party or candidate it shall be the duty

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of the Secretary of State to determine such an issue. The Ordinaries of the respective counties shall not be required to add any other names for national and state officers on the official ballot except upon certificate of the Secretary of State.

7A. In any party polling less than 150,000 votes in Georgia in the last preceding general election for President of the United States, where contest exists as to the legal Delegates to a National Convention at which a nomination of candidate for the President of the United States is to be made, it shall be the duty of the Secretary of State to determine the issue and to certify the names of the legally elected delegates to the Secretary of the National Committee of the Party interested.

7B. The Secretary of State shall provide and keep on hand a sufficient quantity of self sealing envelopes of uniform appearance and suitable size, and a sufficient quantity of any of the forms above specified for use in the elections aforesaid. He shall furnish the respective Ordinaries all of such forms as may be necessary, and they shall furnish all such forms as may be necessary to the Justices of the Peace at least five days before election day, and on failure to do so the Ordinaries shall be subject to a fine not exceeding $100.00.

Section 4

All laws and parts of laws in conflict herewith be and the same are hereby repealed."

APPENDIX "E"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISON

CIVIL ACTION No. 3013

MRS. ROBERT LEE TURMAN AND CULLEN B. GOSNELL, Plaintiffs,

vs.

J. LON DUCKWORTH, as Chairman Georgia State Democratic Executive Committee; MISS GRACE CANNINGTON, as Secretary Georgia State Democratic Executive Committee; THE STATE DEMOCRATIC EXECUTIVE COMMITTEE of the State of Georgia; BEN W. FORTSON, JR., as Secretary of State of Georgia, Defendants

On August 16, 1946, the above stated case came on for a hearing for an interlocutory injunction before a court of three judges as by statute provided, Hon. Frank M. Scarlett, District Judge, presiding by designation in the Northern District of Georgia, having called to his assistance Hon. Samuel H. Sibley, Circuit Judge, and Hon. Louie W. Strum, District Judge of the Southern District of Florida. After hearing evidence and argument and taken time to consider, it is ordered and adjudged that because of the findings of fact and conclusions of law filed herewith, an interlocutory injunction be and the same is hereby denied.

This August 24, 1946.

(S.) SAMUEL H. SIBLEY,
United States Circuit Judge.
(S.) LOUIE W. STRUM,
United States District Judge.
(S) F. M. SCARLETT
United States District Judge.

Filed in Clerk's Office,
Aug. 26, 1946.
F. L. Beers, Clerk,
By C. A. McGrew, Deputy Clerk.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

CIVIL ACTION No. 3013

MRS. ROBERT LEE TURMAN AND CULLEN B. GOSNELL, Plaintiffs,

vs.

J. LON DUCKWORTH, as Chairman Georgia State Democratic Executive Committee; MISS GRACE CANNINGTON, as Secretary Georgia State Democratic Executive Committee; THE STATE DEMOCRATIC EXECUTIVE COMMITTEE of the State of Georgia; BEN W. FORTSON, JR., as Secretary of State of Georgia, Defendants

The petition, brought in behalf of plaintiffs and others similarly situated, alleges that they are respectively citizens and registered qualified voters of Fulton and DeKalb Counties, Georgia, and voted in the Democratic primary held July 17, 1946, casting their votes for a candidate for nomination for Governor of Georgia who obtained the plurality of votes cast in the primary, but did not obtain the majority of county unit votes required by the Georgia statutes relating to statewide primaries, Georgia Code of 1933, Sect. 34-3212, and Georgia laws of 1943, p. 347; that the Chairman and Secretary of the State Democratic Committee intended to certify to the Secretary of State as the nominee, pursuant to the last cited statute, the candidate having the majority of county unit votes, and the Secretary of State would place such nominee on the official ballots furnished by the State for use in the general election in November, 1946, unless enjoined by the court, to the irreparable damage of petitioners, they having no remedy unless in equity. The contention set up is that the portions of the Statute which make the majority of the county units to control the result rather than the plurality or majority of all ballots cast in the election discriminate, contrary to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, against

the voters in such counties as Fulton and DeKalb, which have a voting strength far in excess of the county unit votes allowed them, as compared with smaller counties; and that the nomination of a candidate for Governor ought to follow the rule of the final election, by which, as provided in the State Constitution, the number of votes cast throughout the State controls. The relief originally prayed was that the county unit rule provided by the statute be declared null and void, and that the Democratic Executive Committee and its Chairman and Secretary and the Secretary of State be enjoined from complying with such statute.

The District Judge ordered the pentition filed but refused a restraining order, and summoned a court of three judges to consider the grant of an interlocutory injunction. Before that court an amendment of the petition was made to allege that since the filing of the petition the time had expired within which candidates could under the State laws qualify as such and have their names entered on the official ballots, so that if the candidate having the majority of the county unit votes has been certified to the Secretary of State his name alone would appear on the official ballot as a Democratic candidate, and in that event it was prayed that the Secretary of State be enjoined from causing the returns from the general election to be laid before the General Assembly for a declaration of the result of the gubernatorial election.

The Secretary of State moved that he be dismissed as a defendant because the suit against him as a State official was in effect against the State itself, and the State has not consented to be sued, and because no claim was stated against him on which relief can be granted.

The other defendants also moved a dismissal as to themselves.

The answer for all defendants, filed subject to the motions to dismiss, asserted that if the things complained of are wrong, the remedy is not in a court of equity, but in the legislative and political department of the State government; that plaintiffs voted in the primary, in which the county unit rule for declaring the result was not only fixed by law, but also by the rules of the State Democratic

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Executive Committee promulgated for this primary, and thereby plaintiffs agreed to such rule, and became estopped to question its application after their candidate failed to win under it; that plaintiffs delayed to object till four days before the time limit for candidates to qualify, and that such delay constitutes laches, which bars equitable relief; that one day before the final date for qualifying candidates, Aug. 6, 1946, the Chairman and Secretary of the Executive Committee did certify to the Secretary of State as the Democratic nominee the candidate having the majority of the county unit votes, and the Secretary of State did (on August 12 as was testified) make up the forms for the official election ballot and did send them out to the Ordinary of each County to be printed as required by law, so that the matter has become moot. The answer substantially admitted the facts alleged in the petition, denying the legal conclusions.

Findings of Fact

The facts are as above set out. In addition the printed rules of the Democratic Executive Committee governing the Democratic primary called for July 17, 1946, were introduced; Rule VI, providing: "Candidates for Governor, State House Officers, including Justices of the Supreme Court and Judges of the Court of Appeals, who receive respectively the highest number of votes in each County shall be considered to have carried that County and entitled to the full vote of such County on the county unit basis, as provided by law . . ." An exhibit to the petition showing the tabulated vote by Counties was neither admitted nor denied by the answer, but was treated as correct in the hearing and we find it to be substantially correct. It shows a total Democratic vote in DeKalb County of 26,770, and in Fulton County of 84,550, each County having six unit votes. Other 6-unit counties cast a vote ranging from Chatham, 39,595, down to Floyd, 11,167. The four-unit counties cast a vote between 10,000 and 5,000. The two-unit counties in general voted less than 5,000; Chattahoochee County only 265, and several others 500 to 600 votes. As facts of common knowledge of which it was conceded

the court can take judicial notice, it is further stated that the population of Fulton and DeKalb Counties, which are contiguous, is rapidly increasing; that Fulton has in recent years absorbed two contiguous counties, Milton and Campbell, by a popular vote as provided in the then Constitution, though not gaining thereby additional representatives in the Legislature, or county unit votes in statewide primaries. Chattahoochee County has had about half its territory taken by the United States and incorporated in Fort Benning.

As background for county units in State political organizations, these general facts are true: The early Constitutions of Georgia not only recognized them in choosing legislators, but also in choosing the Governor. Since 1823, however, the Governor has been chosen by statewide vote. The legislators are still chosen by Counties and a few of the larger Counties have continuously been given additional members in the House of Representatives. Since 1868 the Counties have been by the Constitutions put into three classes, to be reascertained after each decennial census, a fixed number of the most populous being entitled each to three representatives, a fixed number of the next most populous having each two representatives, and the remaining counties having one each. Not only in Georgia, but throughout the United States, the great political parties have regarded county representation in nominating their candidates. Originally, when travel was difficult, the members of the Legislatures themselves assembled in a party caucus and recommended candidates. After 1930 the convention system became prevalent, each County sending delegates generally equal to twice the number of their Representatives. About 1903, the system of party primaries became prevalent, and they were in most States regulated by law. See Introduction to American Government, by Ogg & Ray, pp. 848 to 850. In Georgia primaries were regulated by law to some extent in 1890, but the regulation now in controversy was not made till 1917. But the county unit rule was steadily observed, both in party conventions and primaries, except that in 1906, when Governor Hoke Smith, of Fulton County, was in party leadership that rule was abolished. The abolition was made an issue in the next primary

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nomination for governor, and Governor Smith was defeated on a popular vote basis, and the county unit rule reinstated, and has so remained. (See statement of C. E. Gregory, exhibited in Cook vs. Fortson, decided this day.) When in 1917 the Legislature came to regulate primaries more fully, in adopting the county unit rule it continued what was already in existence by the will of the political parties.

Conclusions of Law

On this hearing for interlocutory injunction we will not pass finally on the motions to dismiss. We consider them, however, on the general question of the grant of interlocutory relief. And we consider that this case is in its general aspects one of party politics, in which courts should not meddle unless the duty to do so is plain. We are of opinion that it would be going too far for a court of equity to undertake to prevent the Secretary of State from performing his functions under laws confessedly valid, or to interfere with his transmitting the returns of the general election to the Legislature. A better case for interfering with the application of the county unit rule by the Democratic Executive Committee would have been presented if the plaintiffs had promptly moved to assert its constitutional invalidity and to stop its application when the Executive Committee, which had the right to determine whether a primary or a convention should be held for nominations, did call the primary of July 17, and published the rules under which it should be conducted, including expressly the county unit rule. The candidates acepted that rule, and none of them is complaining of its application. These voters, voting without protest under it, do not stand well in a belated complaint made after it was too late to have another primary or even a convention nomination, the time for candidates in the general election to qualify being too close at hand.

We have not here a criminal statute about a political matter, as in Re Yarbrough, 110 U. S. 651, and U. S. vs. Classic, 313 U. S. 299, nor a statutory right of action for damages, as in Nixon vs. Herndon, 273 U. S. 536; Smith vs. Allwright, 321 U. S. 649; and King vs. Chapman, 154 Fed. (2) 460. In such cases the power and duty of the courts to

act is plain. Here equity is asked to interfere to achieve or frustrate a political result, and that through the discretionary remedy of injunction. Whether it be that the subject matter is not of equitable cognizance, or merely that equity should withhold its hand, we think the decision in Colgrove vs. Green, — U. S. —, June 10, 1946, requires us to deny equitable relief.

So concluding we might well stop. But as an appeal lies of right, in order that all questions may be ripe for consideration in the Appellate Court if necessary, we will briefly say that on the ultimate merits we do not think the State of Georgia has been shown to have deprived the plaintiffs of the equal protection of the laws. It was held in King vs. Chapman, supra, that the State of Georgia has made party primaries, when called by any political party, a part of the election machinery of the State, and that deprivations of voting rights by virtue of the primary statutes are deprivations by the State. And it is true that under the State Constitution the general election of a governor is not by county units, but by the consolidated popular vote. But there is nothing in the State Constitution in force in 1917 or now, that would prevent the Legislature from prohibiting primary elections altogether, or if they are permitted, from stating the conditions on which they may be held, if the parties elect to have them. The Constitution of the United States has nothing to do with State elections, save as specially provided in certain of the Amendments, Minor vs. Happersett, 21 Wall. 162; Breedlove vs. Suttles, 302 U. S. 277. The amendments relating to abridging the right to vote on account of race, color, or sex, are not involved here. The equal protection clause of the Fourteenth Amendment is alone relied on. Nothing is better settled than that legislative classifications are not by it prohibited if there is a rational basis for them. The three most recent Georgia Constitutions have classified the counties into three classes, based on population and to be readjusted after each census. A federal court can hardly say that Fulton and DeKalb Counties ought by virtue of the Fourteenth Amendment to have a fourth class created to give their voters proportional power and influence in the Legislature, or that the smaller counties should be put into

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another class having no representative. Our system of government, State and Federal, has never sought or demanded that each voter should have equal voting influence, though that might seem an ideal of democracy. In our federal government under its Constitution each State has in the Senate two "unit votes", wholly regardless of population, in the making of all laws, and in confirming treaties and appointments to federal offices. These unit votes also appear in the electoral college in choosing a president, so that there have been presidents who did not receive a majority of the popular votes. The people of the District of Columbia have no vote in their government but are ruled by a Congress elected wholly by others. Touching nominations, all the great political parties in their State and national organizations have followed in their nominating conventions the legislative strength of the States or counties represented, thinking that not to be irrational. Why should it be considered not rational for the Georgia Legislature, in authorizing the substitution of a primary for a convention to say the same rule should govern in either? Moreover there is a practical convenience in the County Unit System in primaries in this: The primary is an additional election, taking much time of voters from their work. In particular counties the contests may be not at all close, so that the result in that county is foreknown to its voters. Very few voters can abstain from voting, knowing their candidates will not suffer thereby. In the returns from the primary now in question it appears that in many of the smaller counties the vote was overwhelmingly for one candidate. Many voters may not have voted at all for that reason. It is argued too in behalf of the convention and county unit systems that it is for the general good that the great centers of population should not be allowed to control the policies and candidates of a political party.

It is undeniably true that there is a glaring inequality between Chattahoochee County and Fulton County in representation in the Legislature, and by consequence in applying the county unit rule to a primary. Perhaps the remnant of Chattahoochee County ought to be merged into an adjoining county. Perhaps Fulton County, which has absorbed Milton and Campbell Counties, ought to have the

representation of these counties added to its own. But the remedy for these exceptional situations is to be sought through changes in the law, rather than by appeal to courts of equity to upset the law as unconstitutional because of a hardship that has arisen.

We conclude on all grounds that an interlocutory injunction should be denied.

(S.) SAMUEL H. SIBLEY,
United States Circuit Judge.
(S.) LOUIE W. STRUM,
United States District Judge.
(S.) F. M. SCARLETT,
United States District Judge.

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